FILED
DEC. 8 1992
OFFICE OF THE CLERK

(3)

No. 92-798

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*, PETITIONERS

v.

COALITION FOR CLEAN AIR, INC., *et al.*, RESPONDENTS

On Petition For A Writ Of Certiorari
To the United States Court Of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS COALITION FOR CLEAN AIR AND SIERRA CLUB

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QUESTIONS PRESENTED

1. Does Section 110(c) of the Clean Air Act, as amended in 1990, 42 U.S.C. § 7410(c), require the Environmental Protection Agency ("EPA") to promulgate Federal Implementation Plans ("FIPs") for ozone and carbon monoxide for the South Coast Air Basin based upon EPA's disapproval in January 1988 of the State Implementation Plan ("SIP") submitted for the South Coast?

2. Should EPA's representations to Congress prior to enactment of the 1990 Clean Air Act Amendments, that the language ultimately adopted in Section 110(c) would mandate completion of the South Coast FIPs, be considered persuasive in interpreting the intent of Congress?

3. Independently of the requirements of Section 110(c), does Section 193 of the 1990 Amendments, 42 U.S.C. § 7515, preserve a settlement agreement and order thereon that, as of the date of the Amendments, required EPA to finalize the South Coast FIPs and associated control requirements by February 28, 1991?

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BRIEF IN OPPOSITION OF RESPONDENTS COALITION FOR CLEAN AIR AND SIERRA CLUB

The Coalition for Clean Air and Sierra Club (jointly, the "Coalition")[1] oppose the Environmental Protection Agency's ("EPA") Petition for Writ of Certiorari ("Petition") and urge that the Petition be denied. The Ninth Circuit Court of Appeals correctly held that EPA is obligated to complete Federal Implementation Plans ("FIPs") for California's South Coast Air Basin, a holding applicable to a very limited set of specific situations that will not recur.

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[1]Respondents Coalition for Clean Air and Sierra Club are not-for-profit corporations that do not have publicly traded stock, or parent or subsidiary corporations. Sup. Ct. R. 29.1.

STATEMENT OF THE CASE

For purposes of this brief, the Coalition incorporates the statement of facts and historical background set forth by the Court of Appeals. Petition at 2a-8a. The following statement clarifies and emphasizes key points.

This case seeks enforcement of EPA's mandatory duty to complete FIPs for the South Coast Air Basin and revolves around interpretation of the provision of the Clean Air Act establishing that mandatory duty -- Section 110(c), as amended in 1990, 42 U.S.C. § 7410(c) (Supp. II 1990). Section 110(c) presently provides: "The Administrator **shall** promulgate a Federal implementation plan at any time within 2 years after the Administrator . . . **disapproves a State implementation plan submission in whole or in part** . . . ." 42 U.S.C. § 7410(c)(1)(B) (Supp. II 1990) (emphasis added).

EPA's duty to promulgate the South Coast FIPs was triggered by the agency's January 22, 1988, promulgation of a final rule disapproving carbon monoxide ("CO") and ozone SIP submissions originally prepared by the South Coast Air Quality Management District ("SCAQMD") in 1982. 40 C.F.R. § 52.237(a)(1) (1991); 53 Fed. Reg. 1780-81 (1988). In the preamble to this final rule, EPA described its action:

> This notice announces EPA's **final disapproval** of the California State Implementation Plan (SIP) for ozone and carbon monoxide (CO) in the South Coast Air Basin (SCAB). . . . **EPA's disapproval** of the South Coast SIP is effective February 22, 1988.

53 Fed. Reg. at 1780 (emphasis added). EPA's disapproval

regulation currently remains in effect.[2]

By disapproving the South Coast SIP in 1988, EPA continued what should have been no more than a six month gap in federally enforceable implementation plans for the South Coast Air Basin, a gap that presently exists only in three areas of California, including the South Coast.[3] EPA acknowledged its duty by entering into a settlement agreement committing the agency to complete the FIPs by February 28, 1991. Proposed FIPs were published in the Federal Register on September 5, 1990, 55 Fed. Reg. 36,458 (1990).

EPA, in the meantime, lobbied Congress to eliminate its FIP obligations, enjoying early success in the Senate. *E.g.*, S.

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[2]The savings clause in Section 193 of the 1990 Amendments expressly saves the disapproval action since it is contained in a regulation. 42 U.S.C. § 7515 (Supp. II 1990). The statement to the contrary in the dissent below, that "[i]t would . . . make nonsense of the new law to hold that the old disapproval must continue in effect despite the relaxation of the standards effected by the 1990 changes . . . ." is incorrect. Petition at 31a. Congress provided for the continuing effect of adopted EPA regulations approving or disapproving SIPs.

[3]Most other areas of the country have EPA-approved plans that, at least on paper, contain enough control measures to provide for attainment of National Ambient Air Quality Standards. In those areas, a federally-approved SIP remains in effect until plan revisions required by the 1990 Amendments are approved by EPA. In California, in addition to the South Coast, neither a complete attainment SIP nor a FIP is in effect in the Sacramento and Ventura areas. To Respondents' knowledge, there are only two other areas of the country where SIPs were disapproved and not adequately revised by the state in question before the 1990 Amendments. In both of these areas (Maricopa and Pima Counties, Arizona and Chicago, Illinois), EPA subsequently has promulgated a FIP. 57 Fed. Reg. 8268 (1992); 55 Fed. Reg. 26,814 (1990).

1630, 101st Cong., 1st Sess. § 105 (1989); 135 Cong. Rec. S11,141 (daily ed. Sept. 14, 1989). However, Senate language that would have eliminated EPA's mandatory duty to promulgate FIPs was removed by a May, 1990 House version of the bill containing the language of Section 110(c) ultimately adopted by Congress. H.R. 3030, 101st Cong., 2d Sess. § 179, 136 Cong. Rec. H2778 (daily ed. May 23, 1990).

In response to the House language that was enacted in the 1990 Amendments, the Administrator of the EPA, William Reilly, wrote to House of Representatives Speaker Thomas Foley and objected:

> The House has [deleted] language that relieved EPA of its **current obligations** to complete federal implementation plans (FIP's). If **current FIP obligations** are not relieved, EPA must impose across-the-board, draconian measures devastating the country's largest industrial area. In light of the new regime for state plan submissions, it makes no sense for EPA to impose FIPs before the states have had a chance to meet their new obligations. For these reasons, the Administration strongly objects to the Committee's approach.[4]

136 Cong. Rec. H2771, H2886-88 (daily ed. May 23, 1990)

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[4]The final version of the bill enacted by Congress added an additional clause to Section 110(c) allowing EPA to avoid FIP promulgation if it first approves a state plan. 42 U.S.C. § 7410(c)(1) (Supp. II 1990). Apart from this change, the language of H.R. 3030 on May 23, 1990, which the EPA letter addressed, was identical to the final enacted version. *See* 136 Cong. Rec. H2778 (daily ed. May 23, 1990).

(emphasis added).[5] EPA recognizes that, "[t]o be sure, the language of Section 110(c) referred to in the Administrator's letter was unchanged in the bill as finally enacted . . . ." Petition at 20. Thus, EPA's contemporaneous interpretation and representations to Congress were that Section 110(c) as adopted obligated EPA to complete the South Coast FIPs.[6]

The 1990 Amendments also contained a broadly worded savings clause, which provides that:

No control requirement in effect, or required to be adopted

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[5]EPA's letter to the House continued as follows: "**In addition to current FIP obligations**, the House Committee bill requires EPA to promulgate comprehensive FIPs in the future . . . ." *Id.* (emphasis added). Thus, EPA Administrator Reilly explicitly distinguished previously triggered FIPs from FIPs that would be triggered by future disapprovals. Through his letter, EPA interpreted the language ultimately adopted by Congress to trigger FIPs by both past and future SIP disapprovals.

[6]EPA claimed **for the first time in its rehearing petition below** that its true "contemporaneous" interpretation of Section 110(c) is a Federal Register notice published January 9, 1991, which asserted in the context of *Delaney v. Environmental Protection Agency*, 898 F.2d 687 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 556 (1990), *motion to recall mandate denied*, March 20, 1991, that EPA was no longer obligated to complete FIPs for **Arizona**. 56 Fed. Reg. 826 (1991). Generally, this Court should decline review on issues not raised in a timely manner below. *See EEOC v. FLRA*, 476 U.S. 19, 24 (1986) ("Our normal practice . . . is to refrain from addressing issues not raised in the Court of Appeals."). The rule applies with full force where, as here, the issue was not raised until a petition for rehearing in the Court of Appeals. *Hoover v. Ronwin*, 466 U.S. 558, 574 n.25 (1984). EPA previously relied upon this Federal Register notice in its unsuccessful motion to recall mandate in *Delaney* that relied on the same arguments presented in the Petition herein. The panel in that case correctly declined to give weight to such litigation posturing.

> by an order, settlement agreement, or plan . . . may be modified after such enactment in any manner unless the modification insures equivalent or greater emission reductions of such air pollutant.

42 U.S.C. § 7515 (Supp. II 1990). EPA's proposed FIP, which was required to be adopted by the settlement agreement in this case, included numerous "control requirements."[7]

EPA's assertion in the Petition that "the legislative history of the Section 193 **savings clause** indicated that Congress did not intend EPA to finalize FIPs for the Los Angeles area" relies on misleading partial quotations of Senators Baucus and Chafee and misapplies those quotes in its interpretation of Section 110(c). Petition at 8 (emphasis added), 20. EPA omits the key statements by those Senators that: "**EPA has the obligation to adopt control measures for sources which it exclusively controls**

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[7]The proposed FIP amply confirms that the settlement obligated EPA to adopt control requirements as part of the FIP. *See* 55 Fed. Reg. 36,458 (1990). Throughout the proposed FIP, EPA interchangeably refers to its provisions as "control measures," "control requirements," or simply "requirements." For example, EPA states: "Estimates of **control requirements** for the South Coast Federal Implementation Plan range from $2 to $6 billion . . .," 55 Fed. Reg. at 36,460; "The 'backstops' would be rescinded or their **requirements** lessened if State and local efforts suffice," *id.* at 36,500; "EPA is also proposing to promulgate a **measure** of one no drive day per week . . . . EPA would only implement this **requirement** as a backstop . . . ." *id.* at 36,506; "Federally enforceable means all . . . **requirements** within any applicable implementation plan," *id.* at 36,545 (emphasis added). The applicability section of each of the FIP backstop measures also describes those measures as "requirements." *e.g.*, 55 Fed. Reg. at 36,552. The fact that Congress was aware of these descriptions in the proposed FIP when it adopted the 1990 Amendments further confirms that the savings clause is intended to apply to control requirements of the sort set forth in EPA's proposed rulemaking.

when those controls are necessary to help attain national standards or meet other requirements of the Act. But, beyond that, **EPA should complete ongoing FIP processes** only for the purposes of ensuring that the standards are met by the statutory deadlines." 136 Cong. Rec. S16,895, S16,970 (daily ed. Oct. 27, 1990) (emphasis added).[8] The portions of the Baucus and Chafee statements on which EPA so heavily relies simply state that the **savings clause** does not require EPA to complete the FIPs **in the form proposed in September, 1990**, and do **not** support EPA's assertion that the FIPs need not be completed at all. *See* Petition at 17a-18a, Appendix 2 hereto at 6a.

EPA has now completed two of the five disputed FIPs that were in preparation during debates on 1990 Amendments. *See* n.3, *supra*. Only the FIPS for the three California areas remain to be adopted.

Given the plain language of Section 110(c) compelling FIP promulgation where SIPs are disapproved, and EPA's contemporaneous representations to Congress in Administrator Reilly's letter that EPA would be required to complete the South Coast FIPs if the House version of Section 110(c) were passed, two panels of the Ninth Circuit and a district court[9] have concluded that EPA remains obligated to complete these and

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[8]EPA cites no legislative history directly supporting its position that the South Coast FIPs need not be completed at all, and the Coalition has found no legislative history to that effect.

[9]In addition to this case, EPA has unsuccessfully presented these same arguments in *Delaney v. EPA*, *supra* at n.6, and *Environmental Council of Sacramento v. EPA*, Civ. No. S-87-420 EJG (E.D.Cal. Dec. 2, 1991), *aff'd*, No. 92-15293 (9th Cir. July 9, 1992), *petition for cert. filed*, November 6, 1992. The *Environmental Council* decision is published in the companion petition for writ of certiorari filed by the United States on November 6, 1992.

similar FIPs. Except for the district court opinion in this case, no court has concluded to the contrary. These holdings are correct and should not be disturbed.

REASONS FOR DENYING THE WRIT

A. Introduction.

EPA concedes that the legal issues presented by the Petition are limited to this case and two other cases in the Ninth Circuit, and that those issues will not recur. Petition at 26. In seeking certiorari, EPA must therefore demonstrate not only that the decision below is in error, but also that an important question is presented. Neither is the case.

The legal arguments presented in EPA's Petition are flawed by an unsupported and grammatically mistaken analysis of Section 110(c), misstatement and misapplication of the legislative history, and an improper reading of *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). Further, the Petition repeatedly alleges, without support, many of the same policy objections to FIPs that failed to persuade Congress. EPA's efforts are misplaced, since it is not the judiciary's role to decline enforcement of Congressional directives based upon its own view of proper policy. *TVA v. Hill*, 437 U.S. 153, 195 (1977) ("[I]n our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with 'common sense . . . .' Our Constitution vests such responsibilities in the political branches.") EPA's baseless policy arguments are all aimed toward the improper end of convincing this Court to produce a result that EPA sought from Congress **and that Congress refused to grant.**

Moreover, even if such policy arguments could properly be taken into account by this Court, those offered by EPA are neither compelling nor even properly supported. EPA's policy claims boil down to two basic assertions: *first*, that FIPs inappropriately intrude on state planning efforts, and *second*, that FIPs are burdensome and inefficient. Neither assertion is correct, nor is either relevant to this case.

B. FIPs Will Support, Rather Than Interfere with, State Planning Efforts in the South Coast.

EPA's objection that the FIPs will intrude on the SCAQMD's planning efforts in the South Coast (Petition at 13) is flatly contradicted by that agency's intervention in support of the Coalition in this case. Indeed, the SCAQMD, the agency responsible for state air quality planning for the South Coast, has concluded that, absent a FIP, attainment of the National Ambient Air Quality Standards ("NAAQS") will remain out of reach. *See* Petition at 40a.

Further, the intrusion argument begs the question of whether Congress intended Section 110(c) to trigger a FIP obligation in the instant circumstance, since by definition all FIPs involve federal-level planning. The FIP requirement in Section 110(c) is a safety net that ensures, where a state fails to generate an adequate implementation plan, one will be prepared and adopted by EPA. In that way, the ultimate goal of the Act to provide healthful air for all citizens is preserved, regulatory gaps are filled, and no region is rewarded for avoiding its statutory obligations.

Perhaps recognizing that its general argument regarding state primacy proves too much, EPA falls back on the defense that the South Coast FIPs inappropriately intrude on local efforts **at the present time**, when state plan revisions are being

developed by the states under timetables established in the 1990 Amendments. Petition at 13. However, EPA fails to explain how this purported intrusion is so extreme that the plain language of Section 110(c) should not be enforced. [10]

In responding to this argument, the majority opinion accurately recognizes that the state can still submit, and EPA consider and approve, appropriate implementation plan revisions that take advantage of the new flexibility in the 1990 Amendments. Petition at 14a-16a. Indeed, Section 110(c) establishes this as the exclusive procedure for avoiding FIP promulgation where EPA disapproves a state plan.

Further, as the majority notes, FIP promulgation at this juncture will create a situation no different from that where a FIP has already been promulgated (as in Chicago and Arizona). Petition at 14a. EPA recognizes that if the South Coast FIPs had been promulgated before the 1990 Amendments, the SIP revisions required by the Amendments would currently be under development with that FIP in place. *See* Petition at 17. EPA has not explained how that circumstance would present the state with

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[10]It is by now well established that a court is not permitted to substitute an interpretation which differs from the plain statutory language simply because it considers another interpretation to make more sense. *Gozlon-Peretz v. United States*, 111 S. Ct. 840, 849 (1991); N.J. Singer, *Sutherland on Statutory Construction*, § 46.01 (5th ed. 1992) ("Unless the defendants can demonstrate that the natural and customary import of the statute's language is either repugnant to the general purview of the act or for some other compelling reason should be disregarded, the court must give effect to the statute's plain meaning.").

any particular difficulties or create "anomalies" in the statutory scheme.[11]

Contrary to its objections to this Court that South Coast FIPs would disrupt the state's role in clean air attainment, the FIPs that EPA actually proposed in 1990 were consciously harmonized with state and local planning. EPA's proposed FIP states:

> EPA strongly supports State and local initiatives . . . . Wherever legally permissible, EPA's own proposal relies on, builds upon, and reinforces these initiatives. In this

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[11]EPA makes much of the fact that the Amendments extend the deadlines for attainment of NAAQS, but the deadline extension was such an obvious feature of the 1990 Amendments that it provides little insight concerning Congress' intention regarding specific provisions elsewhere in the amended Act. Indeed, the new attainment deadlines actually support increased harmonization of state and federal planning, not the suspension of FIPs. Before extension of the expired 1987 deadlines, EPA arguably was obligated to adopt control measures that would provide for attainment as soon as possible. 55 Fed. Reg. 36,504 (1990). With new deadlines, the FIPs need only assist in meeting attainment for CO by 2000 and ozone by 2010. Thus, EPA has more flexibility to dovetail with local planning efforts. Further, Section 182 (e)(5) in the 1990 Amendments, which allows EPA to approve South Coast SIP provisions "which anticipate development of new control techniques" gives additional leeway to coordinate the two processes. 42 U.S.C. § 7511a(e)(5) (Supp. II 1990).

EPA also mischaracterizes its SIP disapproval rulemaking as having been based solely on failure to demonstrate attainment by 1987. Petition at 11 n.6, 16 n.9. EPA's disapproval instead notes that the SIP did not provide for attainment "by any other fixed date . . . ." 53 Fed. Reg. 1780 (1988). The lack of sufficient measures to attain NAAQS by **any** date, including the new statutory deadlines, is the "gap" that EPA now must fill.

> way, we hope to minimize federal intrusion, avoid conflict with and duplication of local efforts, and encourage speedy implementation of the measures State and local authorities wish to adopt. . . . EPA has attempted to design its FIP so as to lend maximum support to the continued development of the State plan, and to allow it eventually to supplant the federal plan in the manner intended by the framers of the Clean Air Act.

55 Fed. Reg. 36,460-61 (1990). Under the new definition of FIPs added by the 1990 Amendments, the FIP can be limited to a supportive role:

> The term "Federal implementation plan" means a plan (or portion thereof) promulgated by the Administrator to fill all or a portion of a gap or otherwise correct all or a portion of an inadequacy in a State implementation plan, and which includes enforceable emissions limitations or other control measures, means or techniques (including economic incentives, such as marketable permits or auctions of emissions allowances), and provides for attainment of the relevant national ambient air quality standard.

42 U.S.C. § 7602(y) (Supp. II 1990).[12] EPA proposed in September 1990 to approve numerous state measures in tandem with its proposed FIP (55 Fed. Reg. 36,466, 36,470), and EPA appears free to finalize its approval of those state measures and

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[12]This definition represents Congress' only response to EPA's policy objections to FIPs, as set out in Administrator Reilly's letter: "[T]he legislation, as noted later, in defining the term 'Federal Implementation Plan' should remove many of the uncertainties and concerns often expressed by EPA in applying this process." H.R. Rep. No. 490, 101st Cong., 2d Sess., pt. 1, at 229 (1990).

related agency commitments now. Thus, the FIP will not need to rely **solely** on measures within federal control. Petition at 12, 23-24.

EPA's policy arguments about FIP interference with state and local planning efforts are also undermined by the fact that the FIP provision survived the 1990 Amendments in large part due to lobbying by state and local air pollution control agencies.[13] This is not surprising given that FIPs augment state efforts with federal measures.[14]

Since EPA proclaims great sensitivity to state and local concerns, and has been given new flexibility in crafting FIPs through the added FIP definition, it can be expected to plan in a cooperative and minimally disruptive manner in concert with state and local agencies. 42 U.S.C. § 7602(y) (Supp. II 1990).

In any event, policy concerns with state primacy cannot trump "the heart of the 1970 Amendments, . . . that the plan provide for attainment of the national primary ambient air quality standards in the particular State 'as expeditiously as practicable . . . .'" *Train v. NRDC*, 421 U.S. 60, 66-67 (1974);

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[13]*See, e.g.*, "Recommendations of the State and Territorial Air Pollution Program Administrators and the Association of Local Air Pollution Control Officials on the Administration-Bipartisan Senate Clean Air Act Agreement," 136 Cong. Rec. S2162-65 (daily ed. March 6, 1990).

[14]In extreme cases like the South Coast, these additional measures can make the difference between an approvable implementation plan capable of attaining federal standards by the statutory deadlines and one that cannot be approved because local measures alone cannot provide sufficient controls. EPA's September 1990 rulemaking containing the proposed FIPs was recognized to have precisely this effect. 55 Fed. Reg. 36,468 (1990).

Union Elec. Co. v. EPA, 427 U.S. 246, 249 (1976).

Here, federal controls are necessary **now** for the implementation plan **ever** to work and meet the NAAQS. It was rational for Congress to continue EPA's FIP duties in this circumstance, as the plain language of Section 110(c) provides.

C. FIPs Can Be an Efficient Supplement to SIPs.

In painting FIPs as irrationally burdensome, EPA first confuses the significant costs and benefits inherent in **any** regulations sufficient to attain required air quality standards in the Los Angeles area with far less momentous questions of which agency or agencies are required by Congress to establish such regulations and when they are required respectively to act.

The burdens of air quality regulation will not be imposed on the Los Angeles region only if the FIPs are adopted; likewise, those burdens will not be eliminated if the FIPs are delayed pending state planning efforts, as EPA requests. Nearly all of the policy arguments raised by EPA (*i.e.*, that significant efforts will be required and that economic and social costs will be incurred) are equally applicable to state and federal implementation plans. Congress' decision to undertake these smog cleanup efforts is fundamental to the Clean Air Act, including the 1990 Amendments, and EPA does not dispute that a major effort will be required in the South Coast area, regardless of the outcome in this case. Petition at 12 ("Any plan to attack and solve the area's 'extreme' ozone problem . . . [will have pervasive impacts]"). The lesser questions of exactly when

and how EPA should participate in this effort simply do not have the broad, highly charged impact attributed to them by EPA.[15]

EPA also claims, without basis, that FIPs are inherently expensive and inefficient, and that federal planning will necessarily be more costly and disruptive than state planning alone. Petition at 22, 23. EPA argues that if an implementation plan is limited to measures over which it has authority, inefficiency will result because some cost-effective measures are not within EPA's power to impose. Petition at 23. Ironically, the state and local agencies have long argued the other side of the coin -- that the incremental measures within their authority are less cost-effective than certain measures available to EPA. Neither side is entirely right or wrong. Since each level of

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[15]EPA persistently emphasizes the costs of air pollution cleanup. But costs and benefits exist on both sides of the equation. Specifically, the social and economic impacts of enduring severe air pollution are staggering. One commentator compiled estimates of health and welfare costs of air pollution in the South Coast Air Basin alone, concluding:

> Social scientists have estimated that the air pollution in the Basin costs about **$8 billion a year in medical costs**, lost work time, and property damage. **Another $8 billion a year** is lost **in aesthetic damages and human discomfort**. Also, medical scientists have concluded that many premature deaths result from air pollution.

W. D. Slawson, *The Right to Protection from Air Pollution*, 59B S. Cal. L. Rev. 667, 673 (1986) (emphasis added). This grim accounting is confirmed by parallel estimates accompanying the SCAQMD's Draft 1991 Plan, which predicted that annual health benefits will be approximately $9 billion when the NAAQS are attained. SCAQMD, *Draft Final Socio-Economic Report for 1991 Air Quality Management Plan*, ES-5 (1991). A copy of this SCAQMD report is attached as Exhibit B to Appellants' Request For Judicial Notice filed with the Ninth Circuit.

government has distinct areas of authority, each has available a range of measures with differing cost-effectiveness. The most cost-effective comprehensive set of regulations can only be achieved if **all** potential measures (local, state and federal) are available for inclusion in the equation.

EPA's argument also assumes -- erroneously -- that the FIP will need to include **only** federal control requirements, rather than the combination of state and federal measures that is now permitted. *See* p.12 & n.11, *supra*; 42 U.S.C. § 7602(y) (Supp. II 1990) (FIP definition quoted at page 12 *supra*). By combining federal and state measures, the implementation plan can achieve the greatest air quality benefit using the most efficient means available at either level of government.

Finally, EPA retreats to creative, colorful depictions of an imagined South Coast FIP, suggesting that it would precipitously cut off fuel supplies to this automobile-dependent region or curtail major industrial sectors. However, it is telling that gas rationing and similarly extreme measures are absent from the FIP actually proposed by EPA in September 1990, even before the 1990 Amendments provided additional flexibility in the FIP definition. EPA's argument reflects compound speculation that draconian measures will be sought by environmentalists or others, that EPA will adopt such measures, that these will survive judicial review, that the public will passively accept them, and that Congress will not act. This Court need not address such unfounded and unlikely forecasts. EPA's FIP obligation has existed for nearly twenty years, but no gas has been rationed nor any industrial subsector shut down yet for clean air purposes.[16]

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[16]For its part, the Coalition has repeatedly objected to such suggestions and vehemently opposes gas rationing or similarly dire proposals that would undoubtedly produce a counterproductive public opinion backlash.

At base, EPA's complaints about the costs of achieving the air quality standards in the Los Angeles region openly question Congress' wisdom in requiring that those standards be met. Petition at 22. Yet there can be no doubt that the requirement to meet NAAQS has been established and that Congress was well aware of its cost when the Amendments were passed. Appendix 1 at 2a. Congress has already balanced these competing policies, and societal costs and benefits; this balance should be enforced, not disregarded as EPA urges. Even if EPA's dire projections were to come true, resort would be to Congress, not to the agency or the courts, to change the law.

D. The Plain Language of Section 110(c) Obligates EPA To Complete the South Coast FIPs.

EPA's extended presentation of flawed factual and policy arguments seems intended to divert this Court from the basic fact that this case revolves around the interpretation and application of a single subsection of the 1990 Amendments, Section 110(c)(1)(B), which provides: "The Administrator **shall** promulgate a Federal implementation plan at any time within 2 years after the Administrator -- . . . **disapproves a State implementation plan** submission in whole or in part . . . ." 42 U.S.C. § 7410(c)(1)(B) (Supp. II 1990) (emphasis added).

In taking action on the South Coast SIP, EPA employed the very term that serves to trigger Section 110(c)(1)(B), through its "disapproval" of the South Coast SIP. *See* pages 2 to 3, *supra*. Thus, the language applied by EPA when it took action on the deficient South Coast plan (of which Congress was aware) is

identical to the term Congress chose in drafting the statutory trigger for EPA's continued FIP obligation.[17]

EPA's principal argument in response is that the use of the present tense "disapproves" in Section 110(c) requires only future application of the FIP requirement, *i.e.*, after the date of the 1990 Amendments. However, EPA fails to explain the flat contradiction between this argument and the agency's contemporaneous representations to Congress in Administrator Reilly's letter. Also missing is any explanation for the lack of an express temporal limitation in Section 110(c), particularly in light of the fact that Congress **expressly** included transitional provisions elsewhere in the statute such as the one that EPA would **imply** in Section 110(c).[18]

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[17]During debates on the Amendments, EPA provided Congress with extensive background information, and specifically informed Congress of its January 1988 disapproval of the SIP submission for the South Coast: "Pursuant to [*Abramowitz*, 832 F.2d at 1079], EPA took final action to disapprove [the South Coast ozone and carbon monoxide] SIPs and to lay the groundwork for imposing the construction ban under section 110(a)(2)(I), 53 FR 1760 (Jan. 22, 1988)." 136 Cong. Rec. S2844 (daily ed. March 21, 1990). There can be no argument that EPA's FIP obligation, triggered by its 1988 SIP disapproval, was continued by Congress inadvertently. It is also illuminating that EPA's description to Congress of its South Coast disapproval regulation was stated in the infinitive "to disapprove" rather than the past tense form that EPA now insists was necessary for its mandatory FIP duty to remain enforceable.

[18]It is well established that where Congress has included limiting language in one portion of a statute, the exclusion of such language elsewhere is an indication that no limitation was intended. *See General Motors Corp. v. United States*, 496 U.S. 530 (1990) ("Since the statutory language does not expressly impose a 4-month deadline and Congress expressly included other deadlines in the statute, it seems likely that Congress acted intentionally in omitting the 4-month deadline in

EPA also does not rebut the Ninth Circuit's statement of proper grammar and usage that "the present tense is commonly used to refer to past, present, and future all at the same time." Petition at 11a.[19] Instead, EPA merely argues that the choice of tense in statutory language is important, which is undisputed, without explaining why Congress' use of the simple present tense in Section 110(c)(1)(B) should not be taken to refer to past, present and future disapprovals alike, in accordance with accepted usage. Petition at 14. EPA's failure in this regard is

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footnote continued:

§110(a)(3)(A)."); *King v. St. Vincent's Hosp.*, 112 S. Ct. 570, 586 (1991).

Congress knew how to draft limiting language when it intended to restart a date from enactment of the Amendments, and it did so repeatedly. *See, e.g.*, 42 U.S.C. § 7410(h)(1) (Supp. II 1990) ("Not later than 5 years after November 15, 1990, and every 3 years thereafter . . . ."); 42 U.S.C. § 7410(k)(1)(A) (Supp. II 1990) ("Within 9 months after November 15, 1990 . . . ."). Congress also knew how to enact "special rules" regarding such dates when it deemed it necessary. Thus, Section 187(a)(2)(B) provides: "Within 2 years after November 15, 1990, in the case of Denver, the State shall submit a revision that includes the transportation control measures as required in section 7511a(d)(1)(A) of this title . . . ." 42 U.S.C. § 7512a(a)(2)(B) (Supp. II 1990). Congress provided for specific circumstances when it wanted to but chose not to for EPA's FIP obligation in the South Coast. The phrase "disapproves a [SIP]" in Section 110(c)(1)(B) is unqualified.

[19]The rule is not reasonably subject to dispute: *See, e.g.*, Craig & Hopper, *1001 Pitfalls in English Grammar*, 3d Ed, Barrons, New York, 1986, at 34 ("RULE: Use the present tense to describe something that is true regardless of time."); Hodges & Whitten, *Harbrace College Handbook*, 9th Ed., Harcourt Brace Jovanovich, 1982, at 87 ("The present tense, for example, is by no means limited to the present time.").

critical, since it leaves the Petition unsupported at its central point.[20]

As a fallback, EPA attempts to find support in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987), which limits citizens' suits under the Clean Water Act to enforcement against polluters "in violation" of the Act. The Ninth Circuit's opinion correctly disposed of this argument. Petition at 10a-11a.[21]

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[20]While not relied upon by EPA in its Petition, the District Court committed a different, but equally critical, grammatical error when it inferred an ambiguity in the referent of the clause "disapproves a [SIP]" by assuming that Congress intended a single, exclusive referent: "The question, then, is **which** rejected SIP is the revised §110 now referring to -- the one which was rejected in 1988 or the new one which must be submitted under the new criteria and on the new time schedule [for SIP submissions under the 1990 Amendments]?" Petition at 38a (emphasis added). Yet, the phrase used by Congress is "a [SIP]". Thus, in defining **which** SIP could trigger EPA's FIP obligation, Congress used the indefinite article "a" rather than the definite article ("**the** SIP"), and Congress did not limit the referent by adjectives or attributives, such as "a new SIP" or "the 1994 SIP." As a result, there is no basis for the District Court's conclusion that Congress was referring to one and only one SIP, or to any particular SIP. The very fact that the District Court thought the provision ambiguous concerning which SIP, past or future, is referred to in Section 110(c)(1)(B) underscores that the statutory use of the simple present tense "disapproves" encompasses both.

[21]In *Gwaltney*, this Court held that a good faith allegation of a continuing rather than wholly past violation is required to maintain a Clean Water Act citizen enforcement suit. As the opinion below recognized, *Gwaltney* addresses different statutory language in a different context and therefore sheds no light on the proper interpretation of Section 110(c)(1)(B). In addition to the reasons identified by the majority opinion, the holding in *Gwaltney* is inapplicable here for several reasons. First, unlike *Gwaltney*, this is not

EPA's final concern, that its FIP was due before enactment of the 1990 Amendments, was accommodated by the Ninth Circuit's order, which directed the District Court "to establish an expeditious schedule," (Petition at 3a) not one that was unattainably retroactive,[22] or that "reduced the time for

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footnote continued:

a civil penalty case, but instead seeks to enforce EPA's mandatory duties. Second, EPA's violation (failure to promulgate a FIP) is continuing. It is not the original disapproval that constitutes the challenged violation but EPA's failure to carry out its resultant FIP obligation. Third, adopted regulations (such as SIP disapprovals) fundamentally differ from the violations of pollution control requirements addressed in *Gwaltney*. Acts of pollution, unlawful when they occurred, can be terminated before a lawsuit has been filed. *Gwaltney*, *supra*, 484 U.S. at 59-61. In contrast, once adopted, a regulation has continuing effect until amended or repealed -- a result underscored here by the Section 193 savings clause in the 1990 Amendments. Thus, the disapproval itself continues, *i.e.*, EPA, by virtue of its continuing SIP disapproval regulation, currently "disapproves" of the 1982 SIP -- or, to parallel the language of *Gwaltney*, is "in disapproval" of that SIP -- yet still fails to carry out its consequent FIP duties.

[22]EPA suggests that continuing its obligation to complete the FIPs for the South Coast Air Basin raises questions of "retroactivity." Petition at 14-15. The flaw in this argument is that the statute required FIPs both before and after the 1990 Amendments, and therefore it is not retroactive. *Sutherland*, *supra* at n.10, § 41.01 (1985) ("[A] statute is not rendered retroactive merely because the facts upon which its subsequent action depends are drawn from a time antecedent to its effective date.") EPA's duty to promulgate the FIPs was adjudicated in this very case **before** the 1990 Amendments. The only change in the statute was to **increase** the time for FIP completion, but application of a **longer** time period to act (two years after SIP disapproval rather than the six months provided prior to the Amendments) cannot possibly have surprised or prejudiced EPA. *Id.*, § 42.02.

producing a FIP to zero." Petition at 14.[23]

In sum, EPA has presented no valid support for its assertion that the use of the present tense "disapproves" limits application of Section 110(c) to disapprovals occurring after the 1990 Amendments. The Ninth Circuit is correct that common usage dictates the opposite conclusion.

E. All of the Legislative History of Section 110(c) Is Contrary to EPA's Litigation Position.

In ruling that EPA's obligation to complete the South Coast FIPs continued after the 1990 Amendments, the Ninth Circuit simply came to the same conclusion as had EPA Administrator Reilly regarding the plain meaning of the language adopted by Congress: Mr. Reilly told Congress that the language would compel EPA to complete the FIPs for the South Coast Air Basin.

The Administrator's letter is useful legislative history for two important reasons. First, it is a direct admission by EPA of what the "plain language" says. Second, it underscores Congress' clear intent in adopting the current language of Section 110(c): Having been told by EPA that such adoption would continue EPA's obligation to complete the ongoing South Coast FIP

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[23]EPA's second fallback, that a FIP could not have been triggered under one of the provisions of Section 110(c)(1)(A) prior to passage of the 1990 Amendments, is a red herring. The Coalition has never argued that this trigger has occurred. Further, that one of three distinct triggers in Section 110(c) is on its face prospective hardly demonstrates Congressional intent to make the other, temporally unqualified triggers prospective as well. The majority correctly disposed of this issue, applying the triggers separately since they are disjunctively referenced. Petition at 10a - 12a.

process, Congress plainly acted intending just that result.[24] Administrator Reilly's interpretation of Section 110(c) as preserving both existing and future FIP obligations is exactly the opposite of EPA's position in this litigation and severely undercuts the credibility of the latter position, transparently formulated to convince the judiciary to undo what Congress did.

Other supportive legislative history is presented in the Opinion below, including the statements of Senators Chafee and Baucus.[25] Petition at 16a-19a. No legislative history supports EPA's position.[26]

F. EPA's Arguments Also Ignore or Misapply Established Rules of Statutory Construction.

EPA's arguments depend upon the assertion that the 1990 Amendments eliminated all applicable pre-Amendment requirements, replacing them with an entirely new statutory scheme. This is by no means the case; the 1990 Amendments preserved nearly all of the key substantive provisions of the former Act. The basic structure of the Act was unaffected, with

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[24]Implicitly, EPA now argues that it was "crying wolf" to Congress, exaggerating the impact of Section 110(c). Petition at 20. This assertion is not only disingenuous but does not counter the fact that Congress, being advised by EPA that the FIPs would be required, approved of that result and left the proverbial wolf at EPA's door.

[25]Contrary to EPA's claim that the majority simply dismissed these statements, it is clear that the majority evaluated them and concluded that they do not support EPA's interpretation. Petition at 17a.

[26]EPA's repeated reliance on the legislative history of the 1977 Amendments (Petition at 3, 4, 24) is particularly off point, since that legislative history sheds little if any light on the intended meaning of specific provisions of the 1990 Amendments passed some 13 years later.

implementation plans being required to provide for NAAQS attainment by statutory deadlines. That the 1990 Amendments extended the deadlines does not affect this basic structure.

EPA wants to deny the obvious, that the 1990 Amendments were simply a second "mid-course correction" to a program first developed by Congress in 1970. By this artifice, EPA attempts to avoid the basic rule of construction that applies: "Provisions of the original act or section which are repeated in the body of the amendment, either in the same or equivalent words, are considered a continuation of the original law." *Sutherland, supra* at n.10, § 22.33 (1985).[27]

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[27]Repeatedly, EPA inaccurately describes the effect of the Amendments on the former statute using such extreme terms as "repealed," "eliminated," "replaced with new provisions that do not preserve any element of the State's prior failures," "[having mooted] the State's original failure," etc. Petition at 8, 11 & n.6, 19. However, Section 110(c) was amended, not repealed. *Sutherland, supra* at n.10, § 23.02. As described by Congress, the Amendments continued the existing clean air program without radical change: "Fundamentally, title I is a continuation of what is already required in current law -- that all areas attain National Ambient Air Quality Standards (NAAQS)." House Report, *supra* at n.12, 165. Even Judge Noonan's dissent recognized that "[t]he new statute is certainly comparable . . . ." and District Court Judge Hupp observed that "§ 110 was left virtually and ambiguously untouched . . . ." Petition at 29a, 41a. Prior to amendment of Section 110(c)(1)(B), EPA's FIP obligation was triggered by a finding that the SIP was not "in accordance with the requirements of this section." 1970 Clean Air Amendments ("CAA"), Pub. L. No. 91-604, §110(c)(2), 84 Stat. 1676, 1681-82 (1970) (renumbered 1977, amended 1990). In 1990, Congress changed the language to require FIP promulgation after EPA "disapproves a [SIP]". 42 U.S.C. § 7410(c)(1)(B) (Supp. II 1990). The language is equivalent because EPA approval of a SIP was mandatory if Section 110 requirements were met; as a corollary, disapproval required a finding that the SIP did not meet the requirements of the Act. CAA § 110(a)(2), 84 Stat. at 1680-81 (amended 1990).

The FIP provision of Section 110(c) was present in the original Clean Air Act and has been continued in substantially the same form through the two major amendments in 1977 and 1990. Even EPA, in note 1 of its rehearing petition to the Ninth Circuit, recognized that "The language of this particular directive was not changed by the 1990 Amendments . . . ." Applying the rule of construction cited above, Section 110(c) must be treated as a continuation of the pre-Amendment law. EPA has **never** addressed this rule of construction, presumably because the rule cleanly disposes of EPA's indirect and inferential arguments.[28]

Also, by arguing that changes elsewhere in the 1990 Amendments (specifically the attainment deadline extensions) implicitly limit the unqualified FIP triggers in Section 110(c), EPA's Petition also runs afoul of the rule of construction disfavoring implied repeal of statutes. *Sutherland*, *supra* at n.10, § 23.09 (1985). Similarly, EPA's argument that the implementing policy of the statute to promote state planning primacy overrides (or renders ambiguous) the plain language of Section 110(c) turns the applicable rule of construction on its head. *Id.*, § 20.12. EPA's failure to apply these established rules of construction should not be condoned.

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[28]The Ninth Circuit's decision is consistent with other decisions addressing minor amendments to statutes in the context of a statutory timetable. *See, e.g., Trichilo v. Secretary of Health & Human Serv.*, 823 F.2d 702, 706 (2d Cir. 1987) (rejecting the argument that the 1985 amendments to EAJA restarted the clock for calculating a cost of living adjustment); *Ramon-Sepulveda v. INS*, 863 F.2d 1458, 1463-64 (9th Cir. 1988); *Sierra Club v. Secretary of the Army*, 820 F.2d 513, 522 (1st Cir. 1987).

G. EPA's Suggested Expansion of *Chevron* Is Unwise, Unsupported and Should Be Rejected.

Lacking direct arguments of substance, EPA retreats to the *Chevron* doctrine, arguing that its view of the scope of its mandatory FIP duties should be given deference. Yet EPA has identified no true conflict between the result below and the decisions in *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), and its progeny *Arkansas v. Oklahoma*, 112 S. Ct. 1046 (1992), and *Rust v. Sullivan*, 111 S. Ct. 1759 (1991).[29] The majority opinion below, and *Environmental Council*, *supra* at n.9, fully complied with *Chevron* by applying the plain meaning rule and, secondarily, by acknowledging Administrator Reilly's letter as the agency's true contemporaneous construction of the statute.[30]

By applying *Chevron* at all, the majority opinion in fact expanded the scope of the *Chevron* doctrine from the delegation

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[29]These cases hold that where Congress has left a gap for an agency to fill, and the agency's interpretation of the statute (embodied in regulation) is a permissible one, the Court will then defer to that interpretation. However, where Congress has mandated that EPA take action, no gap is left for discretionary administrative interpretation. Moreover, EPA has not embodied its interpretation of Section 110(c) in any regulation. Notably, its contemporaneous interpretation of the statutory language, set forth in Administrator Reilly's letter discussed above, conflicts with its litigation posturing here.

[30]It bears emphasis that the Arizona Federal Register notice (discussed *supra* at n.6) that EPA claims deserves deference (Petition at 19) was not even cited to the Ninth Circuit as EPA's contemporaneous construction of the statute until EPA's petition for rehearing, thus explaining the majority's failure to discuss it. Apart from the fact that such late-presented arguments generally should be disregarded, the timing of the argument confirms that EPA's reliance on the Arizona notice is simply a *post hoc* rationalization for litigation purposes rather than a true official or formal interpretation.

context, in which it was developed, to a mandatory duty context, in which it has never been applied.[31] In *Chevron*, the Supreme Court found that Congress had left a gap for EPA to fill through rulemaking on the technical definition of "stationary source" under the Clean Air Act, and that EPA's regulations filling that gap were within the permissible range of discretion intended by Congress. *Chevron* held that where a statute included a broad definition, the very breadth of the definition implied a delegation to the agency to fill the gap in a manner consistent with the goals and purposes of the statute. Here, however, we face a broad **mandatory** duty that is triggered by **all** SIP disapprovals; there is no implied delegation such as the one that served as the basis for the *Chevron* decision. Where Congress establishes a broad mandate, EPA lacks discretion to pick and choose among the duties so mandated; it must comply with all mandates of Section 110(c) without limitation.[32] Expanding *Chevron* to create a rule implying agency discretion to avoid statutorily prescribed mandatory duties would seriously risk misapplying Congressional directives.

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[31]The dissent below also misapplied *Chevron* by doing just what *Chevron* proscribes -- applying the Court's view of proper policy or sensible result to override the plain meaning of the statute.

[32]Similar to the limitations on *Chevron* suggested by Justice Scalia in the dissent in *Crandon v. United States*, 494 U.S. 152, 177 (1989), the interpretation and enforcement of EPA's mandatory duties are judicial, not administrative, functions. EPA's views of the scope of its mandatory duties are not entitled to deference under *Chevron* since EPA is not charged by Congress with interpreting the scope of those duties. The concerns expressed by Justices White, Blackmun and Thomas about applying *Chevron* to the "*post hoc* rationalization of government lawyers" are similarly applicable here. *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 112 S. Ct. 1394, 1405 (1992) (White, J., dissenting).

H. The Section 193 Savings Clause Provides an Alternative Ground for Affirming the Decision.

Even if EPA were correct concerning the proper interpretation of Section 110(c), the Section 193 savings clause, 42 U.S.C. § 7515 (Supp. II 1990), was designed to preserve the benefits of settlement agreements such as the one in this case and to prevent backsliding in ongoing efforts to improve air quality. Because the majority below found that the language of Section 110(c) continued EPA's FIP obligations, it did not address the effect of Section 193 in its opinion. Petition at 8a. However, this savings clause provides an alternative (and more than sufficient) basis for upholding the decision below.

The savings clause precludes modification of any "control requirement . . . required to be adopted by . . . an order [or] settlement agreement . . . unless the modification insures equivalent or greater emission reductions . . . ." The settlement agreement herein obligated EPA to adopt "control requirements" as the central element of the South Coast FIP, as plainly evidenced by the requirements EPA included in its proposed FIP. *See* n.7, *supra*. Indeed, EPA bases its policy arguments concerning Section 110(c) on a parade of horribles resulting from the control requirements that it claims would be needed in the FIP. At a minimum, Section 193 saves the control requirements that were "required to be adopted by . . . [the] settlement agreement" herein, in effect at the passage of the 1990 Amendments. The savings clause thus provides an alternative basis for affirming the decision below.[33]

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[33]The savings clause issue occupied a significant portion of the briefing to the Court of Appeals, and complete presentation of the issue is of necessity beyond the scope of this opposition.

I. There Is No Actual or Potential Conflict of Decisions That Requires Correction by this Court, but a Grant of Certiorari Would Create a Conflict of Decisions.

EPA concedes that "the particular legal question presented in this case is of limited scope and of a non-recurring nature." Petition at 26. The narrow legal question presented here is whether EPA disapprovals of SIPs prior to the 1990 Amendments were intended by Congress to trigger a federal planning obligation under amended Section 110(c). Obviously, all such disapprovals have already occurred. Therefore, the legal effect of the decision has quite restricted application, as EPA acknowledges. Only three areas of California have disapproved SIPs: the South Coast and Sacramento and Ventura Counties, both subjects of citizen suits parallel to this case.[34] These latter two are the **only** other cases that could be affected by the outcome here.[35] As a result, this case presents no broad precedential questions that might warrant review by this Court.

On the other hand, since EPA's request to be relieved of its federal planning obligation for Arizona areas in *Delaney* was denied by the Ninth Circuit, permitting EPA to avoid its duties in the South Coast would create a direct intra-circuit conflict with that decision. Since EPA sought and was denied certiorari in that case shortly after the 1990 Amendments, the creation of

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[34]Similarly, the Section 193 savings clause issues are temporally limited. All of the California cases were the subject of parallel settlement agreements when the 1990 Amendments were passed. No new cases can arise under the savings clause because it requires a settlement agreement and/or order in effect at the time of the Amendments. Petition at 47a.

[35]EPA has cited no other decisions on this issue in any other circuit or district court, and the Coalition knows of none. Nor are there other pending or potential cases raising the question.

such a conflict could not be remedied.

Thus, while there is no conflict of decisions to be resolved by the Supreme Court, a grant of certiorari herein would risk **creating** such a conflict.

CONCLUSION

For the foregoing reasons, EPA's petition for a writ of certiorari should be denied.[36]

Respectfully submitted,

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December 9, 1992

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[36]EPA's suggestion that the matter is appropriate for summary reversal is entirely inappropriate for a variety of reasons. In addition to the correctness of the decision below, EPA's proposed expansion of the *Chevron* decision alone would warrant full briefing and argument. Again, other than the necessarily brief discussion above, the Section 193 savings clause issue has not been briefed or argued to this Court. More generally, interpretation of a complex Congressional enactment such as the 1990 Amendments is not properly the subject of a summary reversal.

APPENDIX 1

The letter from Administrator Reilly to House Speaker Foley, printed at 136 Cong. Rec. H2771, H2886-88 (daily ed. May 23, 1990), reads in pertinent part as follows:

The White House
Washington, D.C.

May 22, 1990

Hon. Thomas S. Foley,
Speaker, U.S. House of Representatives
Washington, D.C.

Dear Mr. Speaker:

As the full House prepares to consider H.R. 3030, the clean air bill which has been reported by the Committee on Energy and Commerce, we would like to offer the Administration's views on both the bill as reported by the Committee and several likely amendments.

The Administration's goal is to secure passage of clean air legislation which obtains the urgently needed environmental benefits called for in the President's original bill in the most efficient and cost-effective manner possible. We are pleased that the bill incorporates many of the features which were included in the President's proposal for the purpose of achieving this goal.

We are particularly pleased that the bill contains the following central features:

. . .

Provisions designed to bring the overwhelming majority of America's cities into attainment with standards for ozone, carbon monoxide, and particulate matter within 10 years; and provisions suggested by the President to ensure steady progress toward attainment by requiring annual percentage reductions in ozone-forming emissions.

We do, however, have several concerns with the Committee bill and with several amendments that may be offered on the House floor.

On January 19th, the President sent a letter to the leadership of the Senate outlining five minimum tests of balance and reasonableness that must be met in any Clean Air legislation which he would sign. Specifically, the President believes that:

The environmental protections in the Administration's bill must be maintained and preserved over time;

The bill should not impose aggregate cost on the economy which exceed those embodied in the Administration's bill by more than 10 percent;

Controls in the bill should achieve reductions in the most cost effective way;

The system of acid rain emissions trading must be preserved and allowed to work; and

The legislation must not include a national electricity tax to pay for controls.

The estimated cost of the Committee bill is already at or slightly above the cost threshold outlined in the President's letter.

Certain amendments could, if adopted, cause the bill to violate this and several other of the President's tests. These amendments are discussed below. Several additional concerns that the Administration has with the Committee bill as reported are discussed in the attachment.

. . .

CONCLUSIONS

The Administration, the House, and the Senate have all devoted a remarkable amount of time to consideration of clean air legislation during the current Congress. We believe that the outlines of a consensus bill that affords significantly increased environmental protection in a cost effective manner are clear.

We now have an opportunity to break a decade-long logjam on clean air. The Administration believes that the House should seize this unique opportunity, and avoid the adoption of any unnecessarily costly amendments which provide little incremental environmental benefit.

We urge Members of the House to support a bill which meets the President's five tests of balance and reasonableness so that clean air legislation can be signed at the earliest opportunity this year.

Thank you very much for your consideration.

Sincerely,

William K. Reilly
Administrator, Environmental Protection Agency
John H. Sununu,
Chief of Staff

ATTACHMENT-KEY ADMINISTRATION CONCERNS WITH COMMITTEE BILL AS REPORTED

FIP'S - The House has delegated language that relieved EPA of its current obligations to complete federal implementation plans (FIP's). If current FIP obligations are not relieved, EPA must impose across-the-board draconian measures devastating the country's largest industrial area. In light of the new regime for state plan submissions, it makes no sense for EPA to impose FIPs before the states have had a chance to meet their new obligations. For these reasons, the Administration strongly objects to the Committee's approach.

In addition to current FIP obligations, the House Committee bill requires EPA to promulgate comprehensive FIPs in the future, regardless of how unworkable such federal measures would be or how impracticable it would be for EPA to implement the FIP. This requirement ignores the dismal history of the current attainment-FIP requirement, including the public uproar and virtual collapse of Title I of the Act that resulted from previous FIPs. It would be counterproductive to signal in this new law that states can avoid their new obligations by simply delaying and waiting for EPA to impose the necessary controls. As in the past, attainment FIPs would be an excuse for state inaction and an albatross around EPA's neck. It would be more responsible for the law to recognize the limitations EPA faces in this area and either allow partial FIPs on a discretionary basis or, as in the Senate bill, mandate only partial FIPs that would assure progress toward attainment.

. . .

APPENDIX 2

The colloquy between Senators Wilson and Chafee, at 136 Cong. Rec. S17,237 (daily ed. Oct. 26, 1990) reads as follows:

Mr. WILSON. I have another concern regarding the "General Savings Clause" which was section 193 of title I of the House bill, and the effect that it could have on California's flexibility to develop its own plan to meet the new requirements of the act. EPA, pursuant to a court settlement, has proposed a federal implementation plan, or FIP, for the Los Angeles area, and has agreed to do similar plans for four other areas of California. The proposed FIP for Los Angeles is a complete plan which includes some questionable federally imposed control measures, such as a 90-percent across the board reduction to all sources regardless of technological or economical feasibility. I am concerned, and I know officials at EPA are concerned, that some might interpret the savings clause as a requirement that EPA finalize its Federal plan and preempt ongoing State and regional air quality planning which would otherwise be required under this bill.

I want to make sure that this bill does not lock us into a virtual Federal takeover of air quality planning in most of the urban areas of California. A takeover that might occur before State and local agencies even have the opportunity to implement the provisions of this act. I am sure that the Senator will agree with me that this was not the intent of the conference committee agreement on this point?

Mr. CHAFEE. The savings provision was intended to ensure that there is no backsliding on the implementation of adopted and currently feasible measures that EPA has approved as part of a State implementation plan in the past, or that EPA has added to State plans on its own initiative or pursuant to a

court order or settlement. The situation you describe goes beyond that intent and would, I agree, create an unfair situation. If EPA were to promulgate complete new plans based on requirements of the old act, the areas subject to those Federal plans would be deprived of the opportunity to utilize the significantly revised and clearly more workable requirements of the revised act. This would be unreasonable, and clearly not our intent.

EPA has been provided significant discretion in applying the savings provision as it relates to FIP's in California. EPA has the obligation, as I discussed earlier, to adopt control measure for sources which it exclusively controls when these controls are necessary to attain national standards and meet other requirements of this act. Beyond that, EPA should complete ongoing FIP processes only for the purposes I have stated above.